of sanctions for failure to preserve evidence in a diversity suit.

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981 (en banc) (Eleventh Circuit adopts as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

Applicability of federal law notwithstanding, our opinion is also informed by Georgia law. Federal law in this circuit does not set forth specific guidelines, therefore, we will examine the factors enumerated in Georgia law. See *Silvestri v. General Motors Corporation*, 271 F.3d 583, 590 (4th Cir. 2001) (concluding that although federal law of spoliation applies, the court will recognize principles from some of the state cases cited to them). Georgia law provides some guidance and was relied upon by the district court and the parties. Moreover, Georgia state law on spoliation is wholly consistent with federal spoliation principles.

Bryant Flury v. DaimlerChrysler Corporation, 427 F.3d 939, 18 Fla. L. Weekly Fed. C. 1020.

As noted above the Eleventh Circuit does not have specific guidelines in spoliation cases, yet the Eleventh Circuit states "moreover, Georgia state law on spoliation is wholly consistent with Federal spoliation principle." How can this be when there are no federal principles?

Most of the Circuit Courts of Appeal apply standards which involve bad faith and willful intent to deprive the other party of the right to inspect before sanctions can be applied.

This Court has not set any standards for the lower courts to follow in determining whether a party is guilty of "spoliation" and if so what sanctions, if any, should be applied. This has resulted in the application of different standards by the lower courts; to-wit: Some of the Courts treat the spoliation issue and sanctions, if any, as a discovery issue; some of the courts treat the spoliation issue and sanctions, if any, as an evidentiary matter under the Federal Rule of Evidence; some of the courts treat the spoliation issues under the inherent power of the Courts to control the progress of cases in their courts; and some of the courts rely upon State standards to decide the issues of "spoliation" and sanctions, if any.

Although *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 is sometimes referred to as holding that Federal law applies in deciding "spoliation" cases, this is not a "spoliation" case but this case does recognize that the District Court has the inherent power to control the progress of the cases in their courts and to control the case by sanctions, however, no guidance or rules are established for "spoliation" cases, therefore, the circuits are split on whether to apply a variety of Federal standards as established by each circuit or to apply the State standards from the State where the case originates or whether to adopt the State standards as the Federal standards. The various approaches cause great variance among the results from the various circuits. The parties get different measures of justice in spoliation cases depending on which circuit or state where they try their case. This Court should grant Certiorari in this case and clarify the standards to apply in spoliation cases so the circuit courts apply the same law throughout the country.

We respectfully submit that this is an important issue that involves every circuit and there is such a disagreement among the circuits that a different standard is applied in almost every circuit. A quick review shows that every Circuit Court of Appeals has had one or more cases involving the issue of spoliation. See Table of Contents of 102 ALR 5th 99 which shows numerous spoliation cases from every Circuit Court of Appeals.

This case also squarely raises the issue of whether the Court of Appeals has the authority to substitute their discretion as to the sanction to be applied as a matter of law for that of the District Court if there is any evidence to support the discretion exercised by the District Court.

In this case, there was no evidence of bad faith or malicious conduct to prevent Defendant from examining the vehicle. There was a showing that there was a five (5) week delay by Defendant in responding at all to the notice and then no follow-up while Plaintiff sought to secure the items requested. No action was pending and Defendant took no action to seek preservation of the product. Plaintiff persuaded the insurance company (State Farm) to not remove the vehicle for at least five (5) months.

Flury did not have all of the information DaimlerChrysler Corporation requested together before State Farm moved the vehicle and sold it for salvage. Flury who was a young working man (R.11–149 at I-48) did not have the funds to pay off the debt to the bank on the vehicle or to purchase it from State Farm. Flury had no notice from State Farm that they were coming to pick up the vehicle before they picked it up. The District Court made no finding that Flury acted in bad faith and found that Defendant

DaimlerChrysler failed to follow up on their request for information and location for five months before the vehicle was lost, to-wit: November, 1996 through April, 1997.

DaimlerChrysler Corporation took no action to offer to pay for the purchase of the vehicle, to pay for the storage of said vehicle, to secure an order to require State Farm, Baxter's Body Shop, Flury or the bank to produce said vehicle or preserve said vehicle. In other words, DaimlerChrylser Corporation did nothing other than write a letter to Plaintiff's attorney and request Plaintiff's attorney to compile information for them and before the information could be compiled State Farm picked up the vehicle without Flury's participation or knowledge.

Flury purchased a 1996 Dodge Ram 1500 pick up new in the summer of 1996. (R11-149 at I-49). (Testimony of Flury.) On November 9, 1996, Flury dozed off while driving his Dodge Ram pick up on a secondary road, while looking for deer, lost control and ran head on into a pine tree. (R11-149 at I-57 &59.) Flury's pick up was traveling between 35 miles per hour and 40 miles per hour when it struck the pine tree. (R11-149 at I-57.) The pine tree was not uprooted in the collision. (R11-149 at I-57.) Barrier Equivalent Velocity (B.E.V.) is the speed of a vehicle when it strikes a fixed object rather than another vehicle because when two vehicles collide part of the velocity is absorbed by the other vehicle, but when a vehicle strikes a fixed object, such as this tree, the velocity is passed back to the vehicle rather than being absorbed by the fixed object. (R11-149 at I-154-155.) Flury did not have anything done, modified or changed on the airbag system during the period of time that he owned this truck in anyway, shape or form. (R11-149 at I-60.)

Flury was the only owner of the vehicle from the time he purchased it new from the Chrysler dealer until the wreck, therefore, no changes were made from the time it left the factory until the wreck.

The vehicle was traveling at 35 m.p.h. to 40 m.p.h. when it hit the tree head on. The air bag was required to deploy when a vehicle is traveling over 15 miles per hour (Barrier Equivalent Velocity (B.E.V.) and the collision is to the front center of the vehicle. See Code of Federal Regulations and testimony of Barry Riner (R11-149 at I-141-143). The tree was equal to a fixed barrier since it did not move. (Barry Riner R11-149 at I-154). Flury had no reason to dispose of the vehicle since it was such a violent collision in which his new truck was totaled with almost $10,000.00 damage and the collision met all requirements to require the air bag to deploy.

There was no evidence Flury acted in bad faith or maliciously or did anything to spoliate the evidence by disposing of it. Flury was the one who got State Farm to leave the vehicle as long as they did. (R11-149 at I-133).

We respectfully submit that the failure of DaimlerChrysler Corporation to take any action for the five months from November, 1996 to April, 1997 to preserve or secure the vehicle was a valid consideration by the District Court. See *Assimack v. J. C. Penney Corp.* 2005 WL 2219422 (M.D.Fla.)

In this case there is no evidence that Flury acted in bad faith, acted maliciously or acted in any way with the intent to prevent DaimlerChrysler Corporation from inspecting said vehicle. In fact to the contrary, he immediately notified DaimlerChrysler Corporation of the collision, what the defect was and identified the vehicle. He also was the one who persuaded State

Farm to leave the vehicle for five months. Flury had no expert inspect the vehicle himself and the photographs he secured from Baxter were shared equally by all the parties. (R11-149 at I-133).

In fact DaimlerChrysler Corporation's expert Dr. Dennis Gunther was able to determine the crush from the photographs by photogrammetry. This was a method whereby he was able to compare a photograph of a comparable vehicle with the photographs of this vehicle and thereby measure how much crush this vehicle suffered. (R11-149 at II-166).

In this case both parties were on equal footing in that Flury had no expert who had seen or inspected the vehicle and DaimlerChrysler Corporation had no expert who had seen or inspected the vehicle. Both parties experts had to work from the photographs, the accident report and the testimony of the parties and witnesses. (R11-149 at II-166).

The District Court on Motion for Summary Judgment reviewed the evidence and considered the position of both parties and determined that the Plaintiff's case should not be dismissed for spoliation of the evidence. An Order denying Defendant's Motion for Summary Judgment was entered by the Court. (R4-57). In addition the Court heard further evidence on the trial and on the trial there was no evidence that Flury had any advantage over DaimlerChrysler Corporation by virtue of an expert who had inspected the vehicle and both experts had the same information available. (R11-149 at II-166). The evidence did not show any bad faith on Flury's part and showed that he got State Farm to not pick up the vehicle for five (5) months and the evidence did not show any malicious intent to prevent DaimlerChrysler Corporation from inspecting the vehicle and the evidence showed that

DaimlerChrysler Corporation never took any action to preserve the vehicle or follow up to contact Flury's attorney or try to preserve the vehicle in any way during the five months the vehicle was available.

In it's discretion the Trial Court determined that under the evidence a charge to the jury that they could draw a negative inference from the spoliation of the vehicle was the appropriate sanction. Neither expert had the advantage of personal inspection of the vehicle and Flury had not exhibited bad faith or malicious behavior so dismissal was not appropriate in the discretion of the District Court.

The panel opinion criticized the negative inference charge on spoliation given by the District Court as inadequate. We point out that this charge was the language requested by DaimlerChrysler Corporation. See Defendant's Charge No. 7. Normally, a party cannot complain of a charge which they request and cannot be used by the party when they get what they request. Flury shows that no sanctions should have been imposed because there was no evidence of bad faith or malice or attempt to prevent inspection of the defective vehicle by DaimlerChrysler Corporation and under the law of spoliation in the District Court Flury should not be guilty of spoliation in the absence of bad faith or malice.

REASONS FOR GRANTING THE PETITION

The Opinion in the present case recognizes that there is a split in the Circuit Courts of Appeal over whether state law of federal law should be applied:

> This is a diversity suit, therefore, we must determine as a threshold matter whether to

apply state or federal law. See *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Courts are split as to the question of whether state or federal law governs the imposition of sanctions for spoliation of evidence in a diversity suit. The majority of circuits have found that federal law applies. See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-50 (4th Cir. 2004) (imposition of sanctions for spoliation is an inherent power of federal courts and the decision to impose them is governed by federal law); see also *King v. Illinois Central Railroad*, 337 F.3d 550, 556 (5th Cir. 2003) (federal courts generally apply their own evidentiary rules in diversity matters, therefore, federal law governs whether a district court abused its discretion in declining to apply spoliation sanctions). Other jurisdictions apply state law. See *Nationwide Mutual Fire Insurance Company v. Ford Motor Co.*, 174 F.3d 801, 804 (6th Cir. 1999).

We agree with the first view, that federal law governs the imposition of spoliation sanctions. Furthermore, in accordance with the fourth and fifth circuits, we conclude that federal law applies because spoliation sanctions constitute an evidentiary matter. See *Cole v. Keller Industries Incorporated*, 132 F.3d 1044, 1046 (4th Cir. 1998); see also *King* 337 F.3d at 556 (5th Cir. 2003). This view is consistent with the law of our circuit regarding the rules of evidence, where we have held that, "in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in the federal courts." *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 609 F.2d 820 (5th Cir. Miss. 1979). Thus, we conclude

that federal law governs the imposition of sanctions for failure to preserve evidence in a diversity suit.

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981 (en banc) (Eleventh Circuit adopts as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

Applicability of federal law notwithstanding, our opinion is also informed by Georgia law. Federal law in this circuit does not set forth specific guidelines, therefore, we will examine the factors enumerated in Georgia law. See *Silvestri v. General Motors Corporation*, 271 F.3d 583, 590 (4th Cir. 2001) (concluding that although federal law of spoliation applies, the court will recognize principles from some of the state cases cited to them). Georgia law provides some guidance and was relied upon by the district court and the parties. Moreover, Georgia state law on spoliation is wholly consistent with federal spoliation principles. *Bryant Flury v. DaimlerChrysler Corporation*, 427 F.3d 939, 18 Fla. L. Weekly Fed. C. 1020.

In addition, the Court of Appeals of the 3rd Circuit, *Schmid v. Milwaukee Electric Tool Company*, 13 F3d. 76 also points out that there is disagreement as to whether state substantive law or federal evidentiary law should be applied to determine spoliation and what sanctions if any should be applied.

There is some disagreement in this case as to whether the district court's decision to strike the saw and Dr. Bratspies's testimony from evidence

was one made as a matter of substantive Pennsylvania products liability law or federal evidentiary law. There is some authority suggesting that spoliation of evidence, and the sanctions that such spoliation may give rise to, are matters appropriately governed by state law. See, e.g., *Mensch v. Bic Corp.*, 1992 WL 236965 (E.D. Pa. 1992) (applying Pennsylvania law); *Lee v. Boyle-Midway Household Products, Inc.*, 792 F. Supp. 1001, 1005 (W.D. Pa. 1992) (applying Pennsylvania law). On the other hand, there is also authority suggesting that the possible preclusion of evidence in cases such as this is governed by federal law as part of the inherent power of a district court to sanction parties. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, ---- - ----, 111 S.Ct. 2123, 2132-33, 115 L.Ed.2d 27 (1991) (recognizing inherent power of a district court to sanction parties in appropriate cases); *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993) (recognizing the inherent power of a district court to sanction parties for destruction of evidence by, *inter alia*, excluding testimony); *Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (same). The parties have referred us to no case law, however, suggesting that the applicable federal and state law are materially different. Because we conclude that the district court's decision exceeded the appropriate bounds of its discretion under either federal or state law, we need not resolve the choice of law question. *Schmid v. Milwaukee Electric Tool Corporation*, 13 F.3d 76.

Three Circuit Courts of Appeal have held that spoliation issues are decided under State law, to-wit:

The Sixth Circuit Court of Appeals (Ohio) applies the State law to spoliation cases to determine whether a party has been guilty of spoliation and the determination of sanctions, if any. *Nationwide Mutual Fire Insurance Company v. Ford Motor Company*, 174 F.3d 801.

The Sixth Circuit Court of Appeals in *Taylor Steel, Inc. v. Keeton*, 2005 Fed. App. 033OP, relies on Ohio law in a spoliation case.

The Seventh Circuit Court of Appeals in *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d. 804 applied Illinois law in deciding the spoliation case.

The Tenth Circuit Court of Appeals in *Coletti v. Cudd Pressure Control*, 165 F.3d. 767, relied upon Wyoming law to draw an adverse inference against a party responsible for losing or destroying evidence.

In *Estate of Trentadue, Ex. Rel. Aguilar v. U. S.*, 397 F.3d. 840 the Tenth Circuit of Appeals held that under Oklahoma law adverse presumption that follows destruction or spoliation of evidence arises only in cases of willful destruction or suppression.

In addition the Third and Eleventh Circuits have used State Standards where there were no Federal Standards.

The 3rd Circuit adopted the standards to be applied in the 3rd Circuit in spoliation cases, to-wit:

> The district court here invoked a sanction far more serious than the spoliation inference. It barred all evidence emanating from Dr. Bratspies's observations and thereby deprived Schmid of any opportunity to prove this case.

> While we do not doubt the inherent authority of a district court to impose such a drastic sanction in an appropriate case, we conclude that this was not such a case. We believe the key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. See *e.g., Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir. 1993); *SDI Operating Partnership, L.B. v. Neuwirth, 973 F.2d 652 (8th Cir. 1992); Gorelick, et al., supra*, §3.16, p. 117 ("To fulfill the purposes of discovery sanctions ... - that is, to restore the accuracy of the trial, compensate innocent victims, and punish guilty spoliators – courts select the least onerous sanction corresponding to the willfulness of the destructive art and the prejudice suffered by the victim.") An analysis in this case sensitive to these considerations does not support the judgment of the district court. *Schmid v. Milwaukee Electric Tool Corporation*, 13 F.3d 76.

The Ninth Circuit adopted a different set of standards to reverse the judgment of a District Court's striking of an answer, and dismissal of Defendant's counter-claim, to-wit:

> The only ground cited directly by the district court for its dismissal was its inherent power "to impose sanctions for discovery abuses that may not be a technical violation of the discovery rules." The Supreme Court has recognized this as an acceptable ground. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67, 100 S.Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980). As noted above, we review dismissals under inherent powers for abuse of discretion. *U. S. v. National Medical Enterprises, Inc.*, 792 F.2d at 910; *Fjelstad v. American Honda Motor Co., Inc.*, 762 F.2d at 1337. Dismissals under a court's inherent powers are subject to much the same considerations as those under the Federal Rules of Civil Procedure. A district court must determine (1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the efficacy of lesser sanctions, (4) the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case, and finally, as optional considerations where appropriate, (5) the prejudice to the party victim of the misconduct, and (6) the government interests at stake. We discuss each of these factors in turn. *Halaco Engineering Co. v. Costle*, 843 F.2d 376 (27 ERC 1481, 10 Fed.R.Serv.3d 1152.

The Third Circuit established criteria where prejudice to the party is only an optional consideration after the Court has considered other criteria. This again is contrary to the criteria established in this case.

In addition the Second Circuit Court of Appeals, the Fifth Circuit Court of Appeals, the Seventh Circuit Court of Appeals, the Tenth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have each set up standards in spoliation cases which are inconsistent with each other.

In this case there was no finding of bad faith or negligence, any extraordinary circumstances or discovery abuse by Plaintiff.

We respectfully submit that three circuits have established that they will apply state law in spoliation cases, and the majority of the circuits have established that they will apply federal law in spoliation cases; however, since there is no established federal standards in spoliation cases, these circuits either adopt the various state standards or make up their own standards which are inconsistent and vary from one circuit to the next.

In other words, should the decisions on spoliation be made under F.R.C.P. (Rule 37 and Rule 41 (b)) or should they be made under F.R.E. or should they be made under the inherent power of the Court to control the cases or should they be made under state law? Also should the Court establish national criteria to be applied by the circuit Courts to avoid the variance from circuit to circuit now?

Should the present decision of the Court of Appeals be reversed where the Eleventh Circuit Court of Appeals substituted its discretion for the discretion and findings of the District Court where there were no findings of bad faith, fault, negligence or other adverse finding and there was evidence to support the discretion exercised by the District Court?

In *Silvestri v. General Motors Corp.*, 271 F.3d. 583, where the parties agreed that the law of New York

where the accident occurred supplies the applicable principles of spoliation, the District Court concluded that a federal law of spoliation applied. Nevertheless, the District Court recognized the articulation of spoliation principles from the New York cases cited.

In *Residential Funding Corporation v. DeGeorge Financial Corporation*, 306 F.3d. 99 the Second Circuit has adopted a different set of criteria to determine whether a charge on negative inference from spoliation. They now establish that (1) negligence rather than bad faith or gross negligence; (2) **District Court's** finding that party acted with gross negligence or in bad faith with respect to discovery obligations ordinarily sufficient to support finding that missing or destroyed evidence would have been harmful to that party; and (3) District Court's finding that Defendant "purposefully sluggish" in producing discovery material would support inference that material not produced in time for trial were harmful to Defendant, warranting adverse inference instruction. This Court held further that in spoliation cases the jury would determine if the material was unfavorable to the party.

The Fifth Circuit Court of Appeals in *Condrey v. Suntrust Bank of Georgia*, 2005 WL 3030374 relies on Georgia law that spoliation of evidence raises a presumption against the spoliator.

The Fifth Circuit in *Vick v. Texas Employment Com'n*, 514 F.2d. 734 has established that fair adverse inferences to be drawn from destruction of records, circumstances of act must show bad faith and mere negligence is not enough.

In *King v. Illinois Cent. R.R.*, 337 F.3d. 550, Circuit Court of Appeals (Fifth Circuit) requires bad faith before adverse inferences may be applied.

Park v. City of Chicago, 297 F.3d. 606, from the Seventh Circuit Court of Appeals sets forth that a party's destruction of or inability to produce document standing alone, does not warrant inference that document, if produced, would have contained information adverse to the party's case, rather, to draw such inference, party must have destroyed documents in bad faith.

The Tenth Circuit Court of Appeals in *Aramburu v. Boeing Co.*, 112 F.3d. 1398 established that mere negligence in losing or destroying records does not authorize unfavorable inference.

The Eleventh Circuit previously allowed an adverse inference from spoliation only when absence of that evidence is based on bad faith. *Bashir v. Amtrak*, 119 F.3d. 929 (1997); *Penalty Kick Management, Ltd. V. Coca Cola Co.*, 318 F.3d. 1284 (2003).

NOTE: In this case, the Eleventh Circuit Court of Appeals noted that the Circuit Courts of Appeals:

> "are split on whether State or Federal law governs the imposition of sanctions for Spoliation of Evidence in a diversity suit, therefore, we must determine as a threshold matter whether to apply state or federal law. See *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Courts are split as to the question of whether state or federal law governs the imposition of sanctions for spoliation of evidence in a diversity suit. The majority of circuits have found that federal law applies. See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-50 (4th Cir. 2004) (imposition of sanctions for spoliation is an inherent power of federal courts and the decision to impose them is

governed by federal law); see also *King v. Illinois Central Railroad*, 337 F.3d 550, 556 (5th Circ. 2003) (federal courts generally apply their own evidentiary rules in diversity matters, therefore, federal law governs whether a district court abused its discretion in declining to apply spoliation sanctions). Other jurisdictions apply state law. *Nationwide Mutual Fire Insurance Company v. Ford Motor Co.*, 174 F.3d 801, 804 (6th Circ. 1999).

Bryant Flury v. DaimlerChrysler Corporation, 427 F3d. 939 (18 Fla. L. Weekly Fed. C 1020).

However, the Eleventh Circuit Court of Appeals then proceeded to apply Georgia law for the criteria in this case which we submit was misapplied when the Eleventh Circuit panel held that under the criteria set forth by the Georgia Courts it was mandatory that the Plaintiff's case be dismissed for spoliation which was contrary to the holding of the Georgia cases. (See *Bridgestone/Firestone North American Tire, LLC, et al. v. Campbell*, 258 Ga. App. 767, 574 S.E.2d 923 (2003) which held that dismissal was **not** required). In the case of *Chapman v. Auto Owners Insurance Company*, 220 Ga. App. 539; 469 SE2d 783, the Court of Appeals held that the matter of spoliation and what sanctions, if any, were for the trial judge, not the Appellate Court

CONCLUSION

The petition for writ of certiorari should be granted and the opinion of the Eleventh Circuit Court of Appeals should be reversed and the Judgment of the District Court should be affirmed.

Respectfully submitted, this 28th day of February, 2006.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRYANT FLURY,
Plaintiff-Appellee,

Versus

DAIMLER CHRYSLER CORPORATION,
Defendant-Appellant.

October 5, 2005, Decided

October 5, 2005, Filed

COUNSEL: For DaimlerChrysler Corporation, Appellant: Raymond M. Kethledge, Bush Seyferth Kethledge & Paige PLLC, TROY, MI; M. Diane Owens, Long, Weinberg, Ansley & Wheeler, ATLANTA, GA; Carolyn Cain Burch, Swift, Currie, McGhee & Hiers, LLP, ATLANTA, GA.

For Bryant Flury, Appellee: Richard D. Phillips, Phillips & Kitchings, Ludowici, GA.

JUDGES: Before BIRCH, CARNES and FAY, Circuit Judges.

OPINIONBY: FAY

OPINION: FAY, Circuit Judge:

Plaintiff, Bryant Flury ("Flury"), sued defendant, Daimler Chrysler Corp. ("DCC"), for enhanced injuries, which he claimed to have suffered as a result of a manufacturing defect in his vehicle's airbag system. On June 30, 2004, a jury awarded Flury $ 250,000 for enhanced injury. DCC now appeals on the following three grounds: (1) The district court erred in denying DCC's motion for judgment as a matter of law under Fed. R. Civ. P. 50; (2) The district court erred in allowing the testimony of Flury's accident reconstruction expert, Barry Riner ("Riner"); and (3) The district court failed to impose meaningful sanctions for spoliation of the subject vehicle. We agree that the district court failed to impose meaningful sanctions for plaintiff's spoliation of critical evidence and reverse on those grounds.[1]

I. Background

Flury purchased a new 1996 Dodge Ram pickup truck, with no modifications to the airbag system, from Taylor Chrysler in Claxton, Georgia in the summer of 1996. On November 9, 1996, Flury fell asleep while driving the vehicle, drove off the road and crashed into a tree. Flury was wearing a seatbelt during the accident, but the vehicle's airbags did not deploy. Flury testified that he was traveling at approximately 55 miles per hour when he drove off the road. His truck went through a ditch, sideswiped a utility pole, proceeded through a fence, and then struck a pine tree. Flury estimated that the truck was traveling at 35 to 40 miles per hour when it hit the tree.

Riner, Plaintiff's accident reconstruction expert, testified that Flury must have hit the tree at greater

than 15 miles per hour. Riner's opinion was based solely upon his observation of post-accident photographs and consideration of the accident report.[2] The accident report classified damage to Flury's vehicle as extensive. Photographs indicated that the vehicle hood was pushed up and that the bumper was pushed in.[3] State Farm Mutual Automobile Insurance Company ("State Farm") ultimately declared the vehicle a total loss. Riner concluded that Flury must have impacted the tree at over 15 miles per hour to incur that kind of damage.

Riner also presented testimony regarding airbags and what conditions cause them to deploy. He stated that in general, airbags are designed not to deploy when a vehicle collides at speeds less than 8 miles per hour; that airbags sometimes deploy at speeds between 8 and 14 miles per hour; and that airbags should always deploy at speeds of 15 miles per hour or greater. He further stated that his assessment applied most accurately to frontal collisions because the chance of airbag deployment decreases with the angle of collision. That is, the less direct the crash, the less chance that the airbag will deploy. Riner concluded that because Flury crashed head-on into a tree at greater than 15 miles per hour, his airbag should have deployed during the accident.

Dr. Dwayne Clay ("Clay"), Flury's pain specialist, testified that forward flexion could have caused Flury's injury to be more serious. Clay was not allowed to testify that the airbag malfunctioned, or that the airbag would have prevented forward flexion because he lacked knowledge of airbag mechanics.

Following the accident, the vehicle was towed to Baxter's Paint and Body Shop. On November 22, 1996,[4] Flury's counsel sent a letter to DCC notifying DCC of the accident and of the airbag's failure to deploy. The letter specifically directed DCC not to contact Flury without express consent of counsel.[5] DCC replied to Flury's letter on January 3, 1997, requesting, among other things, the location of the vehicle for inspection purposes. By this time, the vehicle had apparently been removed to the residence of Flury's parents. Flury's counsel never responded to DCC's letter.[6] Of course, DCC had no way of conducting any investigation without knowing the vehicle's location. The vehicle was eventually removed from Flury's parents' residence and sold for salvage by his insurer, State Farm. Counsel did not disclose the vehicle's location to DCC prior to its removal by State Farm, nor did he notify DCC of the planned removal. Flury had no knowledge of the vehicle's whereabouts after State Farm had removed it.[7]

As for Flury's injuries, he sought treatment five days after the accident from his general physician, Dr. Jerry Purcell. Flury complained of lower back pain, and Dr. Purcell diagnosed him with lumbar strain. Flury visited Dr. Purcell four times between November 14 and December 10, 1996. Four years later, on October 14, 2000, Flury visited the Evens Hospital Emergency room complaining again of back pain, which he claims started while he was lifting a tire. On March 14, 2002, Flury saw pain specialist, Dr. Dwayne Clay. Finally, in May 2002, Flury visited neurosurgeon, Dr. James Robinson, who performed surgery on Flury for a herniated disk on August 29, 2002.

II. Procedural history

On December 23, 2002, approximately six years after the accident, Flury filed a diversity suit in federal court against DCC for enhanced injury to his lower back.[8] Flury claimed that the driver's airbag of his Dodge Ram was defective because it failed to deploy during the accident. He further claimed that the airbag's failure caused him greater injuries than he would have received if the airbag had deployed properly.

DCC deposed several of Flury's witnesses before trial, including Riner and Clay. DCC moved to exclude Clay's testimony under Fed. R. Evid. 702. Certain portions of Clay's testimony were consequently excluded from evidence pursuant to an order from the magistrate judge. Specifically, the order excluded that portion of his testimony pertaining to airbag mechanics, based on the conclusion that Clay lacked the requisite knowledge to present testimony on that subject. DCC also moved to exclude Riner's testimony under Fed. R. Evid. 702. The magistrate entered an order granting in part and denying in part DCC's motion. Specifically, the order excluded that portion of Riner's testimony regarding airbag system design and manufacture because Riner lacked sufficient training on that subject.

On March 15, 2004, DCC moved for summary judgment under Fed. R. Civ. Pro. 56. The court denied DCC's motion, and applied a balancing test to the issue of spoliation in order to determine whether or not dismissal was warranted on those grounds. The balancing test weighed the culpability of the spoliator against prejudice to the opposing party. See *Bridgestone/Firestone North American Tire, LLC v.*

Campbell, 258 Ga. App. 767, 574 S.E. 2d 923, 927 (Ga. App. 2002). The court did not delve specifically into the Bridgestone/Firestone factors, but rather focused on the relative culpability of the parties. The court determined that DCC had several months to follow up on its request to inspect the vehicle, therefore, DCC shared some of the culpability and dismissal was not warranted.

Instead of dismissing Flury's case, the court instructed the jury to apply a rebuttable presumption that the evidence not preserved, in this case the vehicle, was unfavorable to the party responsible for spoliation. Thus, if the jury found that Flury was responsible for spoliation before DCC had an opportunity to inspect it, the jury should presume that the vehicle was not defective. The court did not find plaintiff responsible for spoliation and in fact suggested that defendant was partly to blame. The court ultimately left the issue of spoliation to the jury.[9]

Trial began on June 28, 2004, and at the close of Flury's case in chief, DCC moved for judgment as a matter of law under Fed. R. Civ. P. 50. The district court withheld judgment on the motion, and the jury ultimately awarded Flury $ 250,000. DCC subsequently renewed its motion for judgment as a matter of law, and the motion was denied.

III. Spoliation Sanctions

We review the district court's decision regarding spoliation sanctions for abuse of discretion. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55, 111 S. Ct. 2123, 2138, 115 L. Ed. 2d 27 (1991); see also *Harris v.*

Chapman, 97 F.3d 499, 506 (11th Cir. 1996)(district court's denial of sanctions reviewed for abuse of discretion). This case hinges upon the significance of the evidence destroyed, and upon the extreme prejudice the defendant suffered as a result. Although the district court is afforded a considerable amount of discretion in imposing sanctions, we believe the extraordinary nature of plaintiff's actions coupled with extreme prejudice to the defendant warrants dismissal.

Plaintiff failed to preserve an allegedly defective vehicle in a crashworthiness case. The vehicle was, in effect, the most crucial and reliable evidence available to the parties at the time plaintiff secured representation and notified defendant of the accident. n10 By the time plaintiff filed suit, years after the accident had taken place, plaintiff had allowed the vehicle to be sold for salvage despite a request from defendant for the vehicle's location. For these reasons, we believe the resulting prejudice to the defendant incurable, and dismissal necessary.

i. Choice of Law

This is a diversity suit, therefore, we must determine as a threshold matter whether to apply state or federal law. See *Hanna v. Plumer*, 380 U.S. 460, 14 L. Ed. 2d 8, 85 S. Ct. 1136; 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). Courts are split as to the question of whether state or federal law governs the imposition of sanctions for spoliation of evidence in a diversity suit. The majority of circuits have found that federal law applies. See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-50 (4th Cir. 2004)(imposition of sanctions for spoliation is an inherent power of federal courts and the

decision to impose them is governed by federal law); see also *King v. Illinois Central Railroad*, 337 F.3d 550, 556 (5th Cir. 2003)(federal courts generally apply their own evidentiary rules in diversity matters, therefore, federal law governs whether a district court abused its discretion in declining to apply spoliation sanctions). Other jurisdictions apply state law. See *Nationwide Mutual Fire Insurance Company*, 174 F.3d 801, 804 (6th Cir. 1999).

We agree with the first view, that federal law governs the imposition of spoliation sanctions. Furthermore, in accordance with the fourth and fifth circuits, we conclude that federal law applies because spoliation sanctions constitute an evidentiary matter. See *Cole v. Keller Industries Incorporated*, 132 F.3d 1044, 1046 (4th Cir. 1998); see also *King* 337 F.3d at 556 (5th Cir. 2003). This view is consistent with the law of our circuit regarding the rules of evidence, where we have held that, "in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in the federal courts." *Johnson v. William C. Ellis & Sons Works, Inc.*, 609 F.2d 820 (5th Cir. 1980).[11] Thus, we conclude that federal law governs the imposition of sanctions for failure to preserve evidence in a diversity suit.

Applicability of federal law notwithstanding, our opinion is also informed by Georgia law. Federal law in this circuit does not set forth specific guidelines, therefore, we will examine the factors enumerated in Georgia law. See *Silvestri v. General Motors Corporation*, 271 F.3d 583, 590 (4th Cir. 2001)(concluding that although federal law of spoliation applies, the court will recognize principles from some of the state cases cited to them). Georgia law provides

some guidance and was relied upon by the district court and the parties. Moreover, Georgia state law on spoliation is wholly consistent with federal spoliation principles.

ii. Analysis

We have long acknowledged the broad discretion of the district court to impose sanctions. This power derives from the court's inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases. See *Chambers*, 501 U.S. at 43, 111 S. Ct. at 2132. Accordingly, sanctions for discovery abuses are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process. See *Gratton v. Great American Communications*, 178 F.3d 1373, 1374 (11th Cir. 1999). Dismissal represents the most severe sanction available to a federal court, and therefore should only be exercised where there is a showing of bad faith and where lesser sanctions will not suffice. See Id.

No lesser sanction will suffice in this case.[12] The record reveals that plaintiff knew the location and condition of the subject vehicle for a considerable amount of time following the accident. Moreover, plaintiff was fully aware that defendant wished to examine the vehicle. Knowing this, plaintiff ignored defendant's request and allowed the vehicle to be sold for salvage without notification to defendant of its planned removal. Even absent defendant's unambiguous request for its location, plaintiff should have known that the vehicle, which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case. Plaintiff's failure to preserve the vehicle resulted in

extreme prejudice to the defendant, and failure to respond to defendant's letter displayed a clear dereliction of duty.

Moreover, the district court's instruction regarding spoliation was insufficient to cure the resulting prejudice to defendant. The instruction was weak and allowed the jury to balance the conduct of the parties. The record makes evident that only one party was at fault for the vehicle's spoliation - the plaintiff! Defendant could not have prevented spoliation, nor could any such action have been expected, because defendant was never informed of the vehicle's location and plaintiff did not file suit until years after the vehicle's removal.

Next we proceed to the district court's analysis under Georgia spoliation law and conclude that the court erred in its application. Dismissal is clearly warranted under Georgia law. According to Georgia law, spoliation of critical evidence may warrant the imposition of sanctions such as exclusion of certain evidence or outright dismissal of the case. See *Bridgestone/Firestone*, 574 S.E.2d at 926. In determining whether dismissal is warranted, the court must consider: (1) whether the defendant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded. As sanctions for spoliation, courts may impose the following: (1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption

against the spoliator. See *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539, 469 S.E.2d 783 at 784.

The district court imposed none of the foregoing sanctions. Although the court instructed the jury on the issue of spoliation and on the presumptions which could be raised against a spoliator, the instruction was extremely weak, as discussed above. In considering the sanction of dismissal, the court focused on the relative culpability of the parties. The court determined that because defendant had months to inspect the vehicle before plaintiff sold it for salvage, defendant was partly to blame for the vehicle's spoliation. In our view, that is clear error. The court made this determination notwithstanding that defendant had no idea where to find the vehicle, had been instructed not to contact the plaintiff, and had made a specific request to plaintiff's attorney for the location of the vehicle. Moreover, the court blamed defendant for not following up on its initial request, and at the same time assigned no fault whatsoever to plaintiff for failing to respond to the defendant's letter.

The district court's instruction, even if properly imposed as a sanction against plaintiff, was insufficient to cure defendant's prejudice. Defendant was severely prejudiced as a result of the vehicle's destruction. Specifically, defendant did not have an opportunity to examine the vehicle's crush pattern, its airbag control module, or its present condition. Crush pattern is often the best evidence of a vehicle's impact speed and absence of such evidence can therefore be highly prejudicial. See *Silvestri*, 271 F.3d at 591. Moreover, loss of the vehicle's airbag control module prejudiced defendant because the module is capable of providing

reliable evidence of airbag malfunction. The airbag control system with its sensors, control module, and related systems was the crux of the case. Without the vehicle, defendant lost a valuable opportunity to test plaintiff's theory that the airbag was indeed defective. Finally, without examining the vehicle, defendant could not determine whether it remained in its "condition when sold" at the time of the accident, as required by Georgia law.[13] For these reasons, direct examination of the vehicle's condition was critically important to this case. Spoliation of the vehicle forced experts to use much less reliable means of examining the product's condition. The district court thus erred in concluding that a simple jury instruction could cure the resulting prejudice to defendant.[14]

With regard to the fourth factor, Georgia law does not require a showing of malice in order to find bad faith. See *Bridgestone/Firestone*, 574 S.E.2d at 927. The court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party. Id. Strangely, the district court hinged its analysis on defendant's culpability. However, the district court erred in assigning fault to the defendant. Defendant could not have ensured preservation of the vehicle because it had no knowledge of the vehicle's whereabouts. In addition, the defendant was prohibited from contacting the plaintiff. Plaintiff was therefore the only party in a position to preserve the vehicle and failed to do so. Prejudice to the defendant was great, and culpability rested solely upon the plaintiff. Therefore, the balance under *Bridgestone/Firestone* comes out squarely in favor of defendant.

Finally, destruction of the vehicle leaves potential for

abuse in this case. Not only was plaintiff allowed to present expert testimony regarding airbag malfunction, the reliability of which remains questionable, but the plaintiff's entire case rests upon the testimony of said experts. Specifically, plaintiff's expert Barry Riner presented testimony regarding the vehicle's condition based on post-accident photographs and an accident report. While this evidence has some value, we cannot ignore the fact that defendant was precluded from obtaining much more reliable evidence tending to prove or disprove the validity of Riner's statements. The timing of events, from the date of the accident, to the extended amount of time between doctor's visits, to the amount of time it took for plaintiff to file suit, also remains troubling. As noted by the Georgia Court of Appeals, "the spoliation of critical evidence - for whatever reason - may result in trial by ambush." *Bridgestone/Firestone*, 574 S.E.2d at 927 (internal quotations omitted). That is precisely what happened here.

V. Conclusion

Plaintiff's spoliation of critical evidence in this case deprived the opposing party of an opportunity to put on a complete defense. Defendant's attempt to ascertain the vehicle's location for inspection was inexplicably ignored, and as a result, defendant was unable to examine the vehicle's condition. We cannot imagine a case in which the evidence destroyed would prove more critical. The resulting prejudice to defendant is incurable by any sanction other than dismissal. As such, we reverse the district court's decision regarding spoliation, and vacate the court's order with instructions to enter judgment for the defendant.

REVERSED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 This opinion renders moot the first two issues regarding inclusion of expert testimony under Fed R. Evid. 702 and judgment as a matter of law under Fed. R. Civ. P. 50.

n2 Riner did not use the photographs to perform an accident reconstruction using photogrammetric analysis or any other accident reconstruction methodology.

n3 Although there is some confusion as to who took the photographs, it appears that Holly Baxter probably took them, and that they were taken at Baxter's Paint and Body Shop.

n4 The vehicle was apparently held at Baxter's for approximately one month after the accident.

n5 Plaintiff's letter was addressed to Chrysler Corporation/Truck Division and read in pertinent part:

Please take notice that I represent the above-named individual [Arie Bryant Flury] as attorney as a result of damages and injuries received in the above-referenced accident. At the time of the accident, the air bags in his 1996 Dodge 1500... did not deploy, therefore, because of this product defect Mr. Flury sustained enhanced injuries.

Please do not contact my client unless I am present or with my express consent. I hold a contingent fee contract in this case.

Please advise as to who will be handling this claim.

n6 One can only assume that counsel must have had some doubt about the value of this claim since Flury was diagnosed with a back strain, visited the doctor four times, and went back to work.

n7 According to Flury's testimony, this was sometime between six months and one year after the accident.

n8 DCC had heard nothing from Flury's attorney between the November 22, 1996, letter and the filing of the lawsuit.

n9 Specifically, the jury instruction read:

The term "spoliation" refers to the failure to preserve evidence that is necessary to contemplated or pending litigation. The law provides that spoliation creates a rebuttable presumption that the evidence not preserved was unfavorable to the party responsible for the spoliation. Thus, if you find that Plaintiff disposed of the vehicle before providing Defendant an opportunity to inspect it, you may presume that the vehicle was not defective, however, Plaintiff may rebut that presumption.

n10 In fact, the plaintiff failed to have a qualified expert examine the vehicle, including the airbag system, prior to its disposal.

n11 *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc)(Eleventh Circuit adopts as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

n12 In this particular case, even applying the lesser sanction of excluding Riner's expert testimony would have the same practical effect as dismissal. In the absence of Riner's testimony, defendant would be entitled to judgment as a matter of law under Fed. R. Civ. P. 50.

We review the denial of a motion for judgment as a matter of law de novo, and will reverse only if "the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997).

The evidence in this case may be summarized as follows: Flury testified that he veered off the road at approximately 55 miles per hour and crashed head-on into a tree at 35 to 40 miles per hour. Flury sustained a lower back injury as a result of the accident. Riner testified that the vehicle collided with the tree at over 15 miles per hour and that the airbag should have deployed at that speed. Finally, Clay testified that Flury's back injury could have been caused by forward flexion, and that if forward flexion had been reduced, Flury would have been spared some degree of injury.

To begin with, evidence attributing prevention of forward flexion to proper airbag function remains notably absent. In fact, the only testimony in this area suggests that airbags are not designed to protect the lower back, but rather the upper torso. Nevertheless, exclusion of Riner's testimony leaves plaintiff without any evidence that the airbag should have deployed under the circumstances of plaintiff's accident.

n13 This is unusually important in this case because a few months prior to this accident, the plaintiff had collided with a deer and had sustained substantial damage to the front and side of his truck.

n14 Defendant cites, *Chapman v. Auto Owners Insurance Co.*, 220 Ga. App. 539, 469 S.E.2d 783, 784 (Ga. App. 1996) as persuasive authority that "a jury charge is insufficient to counter the prejudice resulting to a party who, because of the destruction of evidence, was unable to put on a full defense of its case."

Filed 9/9/2004
CIVIL ACTION
No. CV202-205

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

BRYANT FLURY,
Plaintiff,

v.

DAIMLER HRY LER CORP.,
Defendant.

ORDER

Plaintiff, Bryant Flury, sued Defendant, DaimlerChrysler Corp. ("Daimler"), in the above-captioned ease for enhanced injuries, which he allegedly suffered as a result of manufacturing defect in the airbag of his vehicle. Plaintiff's ease was tried and submitted to a jury, which returned a verdict for Flury.

The case is before the Court on Defendant' s renewed motion far judgment as a matter of law or, in the alternative, motion for a new trial. Defendant's motions will be DENIED.

BACKGROUND

Flury purchased a new 1996 Dodge Ram pickup truck, with no modifications to the airbag system, from Taylor Chrysler in la ton, Georgia. On November 9, 1996,

Flury was driving this vehicle when he fell asleep at the wheel and drove off the road and hit tree.

Flury claimed that the driver's airbag was defective in not deploying during this accident, thereby causing him injuries. Flury testified that he was driving between thirty five and forty miles per hour when he struck the tree.

Following the accident, the vehicle was towed to Baxter's Paint and Body Shop. On November 22, 1996, Daimler was notified of the accident and the failure of the airbag to deploy. Daimler replied on January 3, 1997, asking for the location of the vehicle so that it might inspect the truck. By this time, the vehicle had been removed to Flury's parents residence.

After the accident, Flury's automobile insurance company, State Farm Mutual Automobile Insurance Company, had declared the vehicle a total loss. Although State Farm obtained title to the truck by paying Flury its fair value, Flury convinced the insurer to leave the vehicle in his custody temporarily. After several months elapsed, State Farm removed the vehicle and disposed of it.

At trial, all the expert witnesses testified that, in a head-on collision, the truck's airbag must deploy if the vehicle is traveling at a speed of at least fifteen miles per hour, barrier equivalent velocity.[1]

Barry Riner, a former state trooper with over twenty wears experience, testified as Plaintiff's expert in accident reconstruction. Riner opined that the truck was traveling at least fifteen miles an hour BEV when

it struck the tree, and that the airbag system should have deployed because the truck collided head-on with the tree.

Dr. Dwayne Clay's deposition testimony was read at trial. Clay opined that allowing Flury's body to move forward put extra pressure on Flury's back, thereby causing Flury to receive enhanced injuries.

STANDARD FOR GRANTING JUDGMENT AS A MATTER OF LAW

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without favorable finding on that issue.

Fed. R. Civ. P. 50 (a) (1). This motion may be renewed within ten days of judgment, in the event of an adverse verdict. Fed. R. Civ. P. 50(b).

STANDARD FOR GRANTING A NEW TRIAL

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States[.]

Fed. R. Civ. P. 59. The Court may grant a new trial if error occurred during the trial of the matter, or if the verdict was against the great weight of the evidence. See Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251 (1940).

DISCUSSION

In its motions before the Court, Daimler claims that there was insufficient evidence that Flury suffered any enhanced injury. Daimler also contends that it is entitled to judgment notwithstanding the verdict because Flury produced no evidence of a defect which proximately caused the airbag not to deploy. Additionally, Daimler argues that judgment as a ratter of law is warranted because the court failed in its "gatekeeper" function under Daubert v. Merrill Doer Pharmaceuticals Inc., by admitting Barry Riner's testimony into evidence. Finally, Daimler renews its argument that Flury's spoliation of the vehicle warrants judgment in its favor as a matter of law. The court will address each of Daimler's contentions in turn.

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Plaintiff Presented Sufficient Evidence of Enhanced Injury

In an enhanced injury case, "Georgia law places on the plaintiff the burden of proving that a . . . defect was substantial factor in producing damages over and above those which were probably caused as a result of the original impact or collision." Polston v. Boomershine Pontiac-GMC Truck Inc., 262 Ga. 616, 619 (1992).

In the case sub judice, Dr. Clay testified: "So, in this case there was an increase in intradiscal pressure with this sudden flexion - forward flexion and result in extension. But is this enough to cause an injury?Yes it is." Clay Deposition 61, Lines 8-11. Clay continued, stating that "if we had stopped some of the forward flexion . . . it would have been less contributory to the injury." Id. at 62, Lines 10-11. This testimony was sufficient to sustain a finding in favor of Flury on the issue of whether he suffered an enhanced injury. This is not the "pyramiding of speculation upon conjecture,"[2] as Defendant claims, but rather a jury drawing reasonable inferences based on the facts presented. Such is the nature of a circumstantial case.

Defendant argues that Clay's testimony was admitted into evidence improperly under Daubert v. Merrill Dow Pharms. Inc., 509 U.S. 579 (1993). Defendant claims that Clay was not qualified to render the opinions he stated, and that his opinions were not based on a reliable or scientifically valid methodology, published or tested.

In Daubert, the Supreme Court explained that the Federal Rules of Evidence abrogated the 'general acceptance' test of Frye v. United States, 29 F. 1013 (D. C. Cir. 1923). Under Federal Rule of Evidence 702, opinion testimony by experts is admissible if it (1) is grounded in facts or data, (2) is reliable, (3) is based on a scientifically valid theory, and (4) if it will assist the trier of fact. Fed. R. Evid. 702. Daubert requires the trial court to consider whether the science can be or has been tested, whether it has been subjected to peer review and publication, whether it has known or potential rate of error, and whether it has been generally accepted. 509 U.S. at 592-95.

Additionally, Defendant protests that Clay's testimony rested on mere speculation and "possibilities," not probabilities. Indeed, Clay does use the word "possibility in his testimony. Clay Deposition 50, Line 23. Defendant contends that this testimony does not meet the standard of proof required because medical opinions must be based on a probability, not a possibility. Hall v. Norfolk S. Ry., 829 F. Supp. 1571, 1578 (N.D. Ga. 1993); Zwiren v. Thompson, 276 Ga. 498 (2003).[3]

Magistrate Judge Graham considered, and rejected, bath of Defendant's arguments. Doc. No. 52. As the Magistrate Judge recognized, the Daubert inquiry is flexible, and depends upon the facts of the case. Id. at 2. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999) . Magistrate Judge Graham determined that Clay was qualified to testify that "if Plaintiff had not been projected far forward as he was, his injuries may not have been as severe." Order, April 21, 2004 at 2-3. As expressed at trial, the Court concurs in the Magistrate Judge's analysis.

Regarding Daimler's contention that medical opinion testimony must be based on a probability rather than a possibility, the Court agrees that this is a correct statement of the law. However, Daimler's attempt to apply this rule to the facts of the case is unavailing. By seizing on Clay's use of the word "possibility," in an out-of-context reference, Daimler misapplies the standard. Clay's answer was given in response to a question regarding his opinion of Flury's injury, based on looking at photographs of the vehicle after the accident. It is not altogether surprising that Clay would misspeak in this context, as he is not an accident reconstructionist.

At another point in the deposition, clay refused to speculate about the "degree [of forward flection] and how many pounds of force[.]" Clay Deposition 62, Lines 20-21. This was appropriate, as Clay recognized that he is not a bio-engineer. Id.

The court must weigh Clay's testimony in total. Clay, applying established principles of medicine, expressed his opinion numerous times during the course of the deposition that Flury's injuries were likely enhanced by the forward flection involved in the accident. See Clay Deposition 46, Lines 21-25; 48, Lines 1-6; 49, Lines 1-4, Lines 11-14; 57, Lines 7-16; 59, Lines 1-8; 61, Lines 7-11; 62, Lines 9-11; 68, Line 10 through p. 69 Line 3; 71, Line 19 through p. 72 Line 4.

Clay's medical opinion testimony meets the standard described in Zwiren, 276 Ga. at 500-03. No "magic words" are required to be used by the expert in reporting his opinion. Id. at 502; Anthony v. Chambless, 231 Ga. App. 657, 659 (1998).

In this regard, the Supreme Court has admonished litigants regarding their pessimism as it relates to the capabilities of the jury: "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596.

The Court finds that Clay followed established principles of medicine in offering his opinion that had Plaintiff not been projected as far forward a he was, his injuries may not have been a severe.

B. Plaintiff's Reliance on Circumstantial Evidence of Manufacturer Defect was Proper

Daimler argues that it is entitled to judgment notwithstanding the verdict because Flury failed to present any evidence of specific manufacturing defect. The Court has previously considered, and rejected, this argument by Defendants in the instant and similar cases. See Flury v. DaimlerChyrsler Corp., NO.CV202-205, Doc. No. 57 at 5-6 (S.D. Ga. 2004); Corbin v. DaimlerChrysler Corp., NO. CV202-164, Doc. No. 78 at 4 (S.D. Ga. 2003).

The Court reiterates its previous determination that, under Georgia law, Flury may rely on circumstantial. evidence that the air bag had a manufacturing defect. The credible evidence of the witnesses established that Flury purchased the vehicle new from the dealer, with no modifications made to the airbag system. There was also credible evidence that established that Flury was traveling in excess of fifteen miles per hour BEV when he collided with the tree.

There was sufficient evidence for the jury to determine that a manufacturing defect existed. See Polston, 262 Ga. at 618-619; Skil Corp. v. Lugsdin, 168 Ga. App. 754, 756-57 (1983) (explaining that "[c]ircumstantial evidence may be used to establish the existence of manufacturing defect" where the product is unavailable for inspection).

Daimler failed to inspect the vehicle for several months following the accident, and the vehicle was unavailable thereafter.[4] Circumstantial evidence of a defect was offered properly in the instant case.

Defendant cites Multivision Northwest, Inc. v. Jerrold Elecs. Corp., 356 F. Supp. 207 (N.D. Ga. 1972), to support its argument that Plaintiff needed to exclude every other theory as a metaphysical possibility, because he was relying on circumstantial evidence. Multivision Northwest, Inc. does not stand for this proposition, and such is not the law in Georgia. Rather, as Defendant quotes, "In civil cases this consistency with one and inconsistency with the other is required to be established only by a mere preponderance." , Id. at 215-16.

Thus, per the usual custom, Plaintiff has his theory of the case, and Defendant has its theory of the case. To prevail, Plaintiff need only show, by credible evidence, that his theory of the case is more likely to be true than Defendant's theory. Plaintiff need not exclude from the realm of possibility that other explanations existed.

C. Riner's Testimony was Admitted Properly

As was the case with Dr. Clay's testimony, Defendant argues that Riner's testimony was admitted into evidence improperly under Daubert and Kumho Tire Co.

Magistrate Judge Graham ruled on Defendant's motion in limine to exclude or limit Riner's testimony. The Magistrate Judge concluded that Riner was competent to testify regarding his opinions as to the speed of the vehicle when it collided with the tree and his opinion that the impact speed was sufficient to cause deployment of the airbag.

Defendant claims that Riner's testimony was improper

because his opinions were not based on a reliable or scientifically valid methodology. Daimler complains that Riner based his opinion on looking at pictures of the wrecked truck, and decried the fact that there was no methodology, no measurements, and no comparisons grounding Riner's analysis. Daimler explained that, in its view, Riner's testimony is "the prototypical example of junk science prohibited by the Supreme Court in Daubert . . ." Defendant's Brief 15.

The Court disagrees. While having the vehicle available for inspection would have been helpful in the case, the lack of the vehicle does not render the parties' experts incompetent to testify. See Foskey v. Williams Bros. Trucking Co., 197 Ga. App.715, 716 (1990); Griffith v. McCall, 441 S.E. 2d 570, 572 (N. C. App, 1994)(accident reconstructionist basing testimony in significant part on photographs of vehicle); State v. Holland, 566 S.E. 2d 90, 93-94 (N. C. App. 2002) (citing to State v. Pardie, 377 S.E.2d 789, 791 (N.C. App. 1989) (accident reconstructionist basing testimony in significant part on photographs); Dufrene v. Willingham, 721 So.2d 1026, 1030 (La. App. 5 Cir. 1998) (same). See generally, Reconstruction of Traffic Accidents, 9 Am. Jur. Proof of Facts 3d 115; Expert or opinion evidence as to speed based on appearance or, condition of motor vehicle after accident, 93 A.L.R.2d 287,Secs.1[a], 3 (1964).

It was the function of vigorous cross-examination to expose any weaknesses in Plaintiff's expert opinion testimony. If there are any issues regarding the reliability or credibility of Riner's testimony, it goes to the weight that the jury should have given his testimony, rather than to its admissibility.

Riner was qualified to testify to matters within his expertise, accident reconstruction. Riner's testimony, regarding the speed of the vehicle at impact, the point of collision, and under what circumstances the airbag should deploy, was proper.

D. Defendant's Spoliation Argument is without Merit

Defendant claims that it is entitled to judgment in the case because Plaintiff did not preserve the vehicle properly for inspection. The Court has previously examined, and rejected, Defendant's spoliation argument. Flury, Doe. No. 57 at 4-5.

In the order on Defendant's motion for summary judgment, a balancing test was applied, weighing the culpability of the spoliator against the prejudice to the opposing party. Id.; See Bridgestone Firestone N. Am. Tire LLC v. Campbell Nissan N. Am., Inc., 258 Ga. App. 767, 770 (2002).

The Court determined that Daimler had several months to inspect the vehicle before it was sold for scrap by Plaintiff's insurer. Because of Daimler's failure to follow up on its expressed desire to examine the vehicle, the court rejected Daimler's request for severe sanctions.

Daimler's argument that judgment as a matter of law is appropriate in the matter because of Flury's spoliation of the evidence remains unavailing.

II. MOTION FOR A NEW TRIAL

The court finds that no error occurred during the trial,

and that there was sufficient evidence for the jury to find as it did. See the preceding analysis, section I., above. The court will not grant a new trial. See Montgomery Ward & Co., 311 U.S. at 251.

CONCLUSION

The court has considered the parties' positions with respect to Defendant's motions. Based on the foregoing analysis, Defendant's motion for judgment as a matter of law is DENIED, and Defendant's motion for a new trial is DENIED. See Doc. No 141.

SO ORDERED, this 8th day of September, 2004.
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Footnotes

fn1 "Barrier equivalent velocity, referred to as BEV, is the speed at which a vehicle goes into a barrier, measured in miles per hour. BEV is used for setting the deployment level for airbags, and it is the measurement used in the relevant federal regulations' Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 65 (1st cir. 2002).

fn2 Defendant's Brief 8.

fn3Georgia law applies on this point, as the certainty of opinion required is part of the causation analysis, a substantive, not procedural, point of law. Thus, the matter is properly analyzed under the governing state law. See Allison v. McGhan Medical Corp., 184 F. 3d 1300, 1320 (11th Cir. 1999); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

fn4 Contrary to Defendant's representation, cases resting upon circumstantial evidence are not "universally" limited, by reason of public polio or otherwise, to those uses where the product is "destroyed in the incident at issue due to the very defect alleged[.]" Defendant's Brief 12. See, e.g., Skil Corp., 168 Ga. App. at 756-57 (allegedly defective saw unavailable for inspection as it had been sent for repair as a routine matter).

Filed 7/1/2004
CIVIL ACTION
No. CV202-205

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

BRYANT FLURY,
Plaintiff,

v.

DAIMLER HRY LER CORP.,
Defendant.

JUDGMENT

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT I ORDERED AND ADJUDGED

that in accordance with such verdict, the Plaintiff, BRYANT FLURY, do have and recover of the defendant, DAIMLER CHRYSLER CORP., the sum of TWO HUNDRED FIFTY THOUSAND AND NO/100, ($250,000.00) DOLLARS together with costs of court, said cost to be taxed by the Clerk of this court.

June 30, 2004

Scott L. Poff
Clerk,

No. 04-15182

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRYANT FLURY,
Plaintiff-Appellee,

Versus

DAIMLER CHRYSLER CORPORATION,
Defendant-Appellant.

12/1/05, Filed

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION (S) FOR REHEARINGAND
PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, CAENES and FAY, Circuit Judges,

PER CURIAM

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

(2)

Supreme Court, U.S.
FILED
MAY 26 2006
OFFICE OF THE CLERK

No. 05-1116

IN THE

Supreme Court of the United States

BRYANT FLURY

Petitioner,

v.

DAIMLERCHRYSLER CORPORATION

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT DAIMLERCHRYSLER CORPORATION

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QUESTIONS PRESENTED

1. Whether state or federal law governs the imposition of spoliation sanctions in diversity cases.

2. If federal law governs the imposition of spoliation sanctions, what the standards for imposing such sanctions should be.

RULE 29.6 STATEMENT

Respondent DaimlerChrysler Corporation ("DCC") is a wholly owned subsidiary of DaimlerChrysler Motors Company LLC, which is itself a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, which in turn is a wholly owned subsidiary of DaimlerChrysler A.G.

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IN THE

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No. 05-1116

BRYANT FLURY

Petitioner,

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DAIMLERCHRYSLER CORPORATION

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DAIMLERCHRYSLER CORPORATION

There is indeed a Circuit split as to whether state or federal law governs the imposition of spoliation sanctions in diversity cases. But that split is lopsided, increasingly stale, and likely to resolve itself without this Court's intervention. The split is also of little practical significance: Regardless of the law nominally applied, courts typically consider substantially the same factors in determining spoliation issues; and courts in a number of cases, including the Eleventh Circuit in this one, have observed that the same result would obtain under state or federal law.

This case is also a poor vehicle for addressing the split. Although the Eleventh Circuit applied federal law, it spe-

cifically noted that Georgia law would require precisely the same result reached here. Indeed the Eleventh Circuit extensively cited Georgia law in its analysis below. Reversal of the Eleventh Circuit's choice-of-law determination, therefore, would not affect the outcome of the case. Moreover, Petitioner did not raise or argue the choice-of-law issue in the District Court or Eleventh Circuit, and thus waived it.

Whether there is a split as to the second Question Presented—relating to the particular factors governing the imposition of spoliation sanctions, if federal law indeed applies—is less clear. Spoliation is a peculiarly fact-intensive issue, and any differences in courts' analyses of it may be more attributable to factual differences between the cases than to disagreements about the law. What is clear, however, is that there is no split as to the proper analysis under the facts presented in this case. The Fourth Circuit has adjudicated another airbag case virtually identical to this one; and its analysis and result were in complete accord with those of the Eleventh Circuit here.

Moreover, this case is a poor vehicle for determining the factors that govern the imposition of spoliation sanctions. The Eleventh Circuit applied the rule that Petitioner appears to advocate here, so any further consideration of the issue would amount to error-correction at best. Moreover, Petitioner again did not raise or argue this issue in the District Court or Eleventh Circuit, and thus waived any argument as to the particular factors that ought to govern the spoliation analysis. The petition should be denied.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a products-liability case, over which the District Court and the Eleventh Circuit had diversity jurisdiction under 28 U.S.C. § 1332. Petitioner fell asleep while driving his 1996 Dodge Ram truck and crashed the vehicle into a tree.

The vehicle's airbags did not deploy in the accident. Petitioner alleges he suffered injuries to his lower back during the accident, and that these injuries would have been reduced had the airbags deployed. DCC contends that the non-deployment of the vehicle's airbags was proper.

II. FACTUAL BACKGROUND

A. Accident Facts

Petitioner purchased the subject vehicle, a new 1996 Dodge Ram pickup, in the summer of 1996. *R11-149* at 49 (testimony of Petitioner). On November 9, 1996, Petitioner fell asleep while driving the vehicle on a secondary road and crashed it into a tree. *Id.* at 52-53. The vehicle's airbags did not deploy. *Id.* at 59.

Petitioner did not seek medical treatment immediately after the accident, but instead "went home[.]" *Id.* at 70. Five days later, Petitioner visited his general physician, Dr. Jerry Purcell, complaining of back pain. *Id.* at 72. Dr. Purcell diagnosed Petitioner as having "lumbar strain . . . which he would get over and get better." *R11-149* at 175 (testimony of Dr. Jerry Purcell). Petitioner visited Dr. Purcell four times between November 14 and December 10, 1996. *Id.* at 183.

Petitioner did not see a doctor for back pain from December 10, 1996 to October 14, 2000. *R11-149* at 120 (testimony of Petitioner). On the latter date, Petitioner visited the Evans Hospital Emergency Room, complaining of "back pain which started when [he was] lifting a tire." *Id.* at 121. The intake form accordingly notes: "Pulled back changing tire." *R14-150* at 109 (testimony of Dr. James Robinson).

B. Spoliation Of The Subject Vehicle

Petitioner had his Dodge Ram towed to Baxter Paint & Body immediately after the accident. *R11-149* at 66. Very shortly thereafter, Petitioner retained counsel concerning the accident, Mr. Richard Phillips, who is the same counsel

representing him now. Thirteen days after the accident, Mr. Phillips wrote to DCC, directing DCC not to "contact my client unless I am present or with my express consent." *R2-29 Ex. B* (November 22, 1996 letter from Richard Phillips to DCC). DCC responded in a letter requesting, among other things, "[t]he location of the vehicle for our inspection." *R2-29 Ex. C* (January 3, 1997 letter from DCC to Petitioner's counsel).

Petitioner's counsel never responded to DCC's letter. By the time of the letter, the vehicle had been moved to the residence of Petitioner's parents. *R11-149* at 132 (testimony of Petitioner). Several months later, Petitioner's insurer, State Farm, paid off the vehicle, removed it from Petitioner's parents' residence, and sold it for salvage. *Id.* at 131. Petitioner did not disclose the vehicle's location to DCC prior to its removal by State Farm, or provide DCC with notice of its planned removal by State Farm. The vehicle was never located after it was sold for salvage.

III. PROCEEDINGS BELOW

A. Proceedings In The District Court

Petitioner filed his Complaint on December 23, 2002, almost six years after DCC had written Petitioner's counsel seeking information as to the vehicle's location. *R-1-1* at 1. Petitioner's theory in the case was that an unspecified manufacturing defect had caused his vehicle's airbags not to deploy in the subject accident, which allegedly enhanced his injuries in the accident. *R4-58* at 9-10, ¶11 (Pretrial Order).

Petitioner's accident reconstructionist, Barry Riner, and one of his treating physicians, Dr. Dwayne Clay, were among the witnesses deposed before trial. *See R-Ex. 35* (deposition of Barry Riner), *R-Ex. 36* (Deposition of Dr. Dwayne Clay). On March 15, 2004, DCC moved under Fed. R. Evid. 702 to exclude (i) Mr. Riner's testimony regarding the subject vehicle's airbag system and speed at the time of impact, and

(ii) Dr. Clay's testimony regarding the causes of Petitioner's alleged injuries. *R2-26* at 1. In an Order dated April 21, 2004, the District Court ruled that "Clay is not qualified to render expert testimony that the failure of the air bag to deploy caused an enhancement of Petitioner's injuries." *R4-52* at 2. In another Order that same day, the Court ruled that "Riner is qualified to render expert testimony regarding accident reconstruction[,]" but that Mr. Riner could not testify "that the air bag system in this case had a defect at the time of the subject vehicle's manufacture." *R4-51* at 3.

DCC separately moved for summary judgment. *R2-28* at 1. Among other things, DCC argued that the case should be dismissed, or in the alternative that Petitioner should be precluded from presenting expert testimony that the vehicle was defective, as sanctions for Petitioner's spoliation of the vehicle. *R2-29* at 12-13 (DCC's Memorandum In Support Of Its Motion For Summary Judgment). DCC also argued that Petitioner lacked evidence creating a genuine issue as to whether the vehicle had a manufacturing defect in its airbag system. *R2-29* at 15-18. Further, DCC argued that Petitioner lacked evidence that any alleged defect caused Petitioner to sustain enhanced injuries in the crash. *R2-28* at 14. The District Court denied DCC's Motion, but ordered that the jury be given a rebuttable adverse-inference instruction regarding the vehicle's spoliation. *R4-57* at 1-6. The instruction provided in part: "[I]f you find that Plaintiff disposed of the vehicle before providing Defendant an opportunity to inspect it, you may presume that the vehicle was not defective, however, Plaintiff may rebut that presumption." *R16-151* at 61.

Trial in the case commenced on June 28, 2004. *See R11-149* at 1. Petitioner presented the testimony of himself, Barry Riner, Drs. Purcell, Clay, and Robinson (all by deposition testimony), and a fact witness, David Baxter. DCC renewed

its objections under Fed. R. Evid. 702 to Mr. Riner's testimony at trial. *R11-149* at 139.

At the close of Petitioner's case-in-chief, DCC moved for Judgment as a Matter of Law under Fed R. Civ. P. 50. DCC argued that Petitioner lacked any evidence of enhanced injury, and lacked adequate evidence of a manufacturing defect. *R14-150* at 124-136. The District Court declined to rule upon the motion at that time. *Id.* at 136.

The jury thereafter returned a verdict in Petitioner's favor in the amount of $250,000.00. *R7-131* at 1. DCC again moved for Judgment as a Matter of Law, arguing among other things that Petitioner failed to present any proof of enhanced injury from the airbag's non-deployment, *R7-142* at 4-10, that Mr. Riner's testimony regarding impact speed was improperly admitted at trial, *R7-142* at 16-18, and that the District Court should have dismissed the case as a sanction for Petitioner's spoliation of the vehicle, *R7-142* at 21. The District Court denied DCC's Motion. *R8-152* at 15.

B. Proceedings In The Eleventh Circuit

DCC presented three arguments on appeal. First, DCC argued that Petitioner presented no evidence on the element of causation, or specifically that deployment of his vehicle's airbags in the subject crash would have diminished the injuries he allegedly sustained during the crash. Second, DCC argued that the estimate of impact speed by Petitioner's accident reconstructionist, Barry Riner, should have been excluded under Fed. R. Evid. 702, because among other things Mr. Riner admitted his estimate was based solely on what he described as an "off-the-top-of my-head" assessment of the amount of crush to the vehicle as reflected in post-accident photos of it. Third, DCC argued that the District Court should have imposed more meaningful sanctions for Petitioner's spoliation of the subject vehicle.